

NOS. 12-73710 & 12-73757
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

National Parks Conservation Association, et al.,
Petitioners ,

v.

United States Environmental Protection Agency and
Robert Perciasepe, Acting Administrator, United States Environmental Protection
Agency,

Respondents .

v.

PPL Montana, LLC,

Respondent -Petitioner ,

ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PACIFICORP'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF
RESPONDENT ENVIRONMENTAL PROTECTION AGENCY

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Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure, PacifiCorp moves this Court for leave to file an *amicus curiae* brief in this matter in support of a position advanced by the United States Environmental Protection Agency (“EPA”). Pursuant to Ninth Circuit Rule 29-3, PacifiCorp has endeavored to obtain the consent from all parties prior to the filing of its *amicus curiae* brief and this motion. The parties’ positions are as follows. PPL Montana, LLC consented to the filing of this *amicus curiae* brief. Petitioners¹ and EPA take no position as to the filing of the *amicus curiae* brief.

PACIFICORP’S INTEREST

PacifiCorp is an electric utility company that wholly or partially owns and/or operates twenty-six coal-fired electric generating units in the states of Utah, Wyoming, Montana, Colorado, and Arizona. Among those, nineteen units are subject to the Best Available Retrofit Technology (“BART”) requirements under the regional haze provisions of the CAA. In addition to the BART requirements, all twenty-six units are potentially subject to Reasonable Progress review under the CAA in this current, or in future, planning periods. This makes PacifiCorp the single largest owner of coal-fired electric generating units subject to regional haze requirements in the western United States.

¹ PacifiCorp refers jointly to the National Parks Conservation Association, Montana Environmental Information Center and Sierra Club as “Petitioners.” PacifiCorp refers to PPL Montana LLC, which is Petitioner in Case No. 12-7357, as “PPL Montana” herein.

Specific to Montana, PacifiCorp owns ten percent of Colstrip Units 3 and 4. Petitioners assert that these units should be subject to controls under the Reasonable Progress requirements of the Environmental Protection Agency's ("EPA") Final Rule at issue in this case,² which Petitioners are now challenging. Moreover, as EPA is interpreting and applying the same statutes and Reasonable Progress requirements to PacifiCorp's facilities in other states, PacifiCorp has a substantial interest in the Court's determination here. For that reason also, PacifiCorp is uniquely positioned to assist the Court in evaluating Petitioners' arguments and the Final Rule.

INTRODUCTION

In this action, Petitioners seek review of EPA's final agency action issuing a federal implementation plan addressing regional haze (the "Final Rule") in Montana pursuant to the Clean Air Act ("CAA"). Among other things, the Final Rule concludes that Colstrip Units 3 and 4 do not need additional emissions controls for nitrous oxide ("NOx") emissions pursuant to EPA's analysis under the Reasonable Progress guidelines. Petitioners object to EPA's decision not to require Reasonable Progress NOx emissions controls for Colstrip Units 3 and 4.

² Approval and Promulgation of Implementation Plans; State of Montana; State Implementation Plan and Regional Haze Federal Implementation Plan; Final Rules, 77 Fed. Reg. 57,864 (Sept. 18, 2012) ("Final Rule").

Petitioners argue, among other things, that EPA improperly found that the NO_x emissions controls advocated by Petitioners, Selective Catalytic Reduction (“SCR”) systems, are required by the Clean Air Act and will assist Montana in meeting its regional haze goals. Petitioners argue on that basis that EPA’s action in not requiring controls for Colstrip Units 3 and 4 is arbitrary. Petitioners’ argument is incorrect, and EPA’s action is not arbitrary, for several reasons: (1) EPA’s determination is fully consistent with published EPA Guidance, (2) its determination is fully consistent with the purpose and intent of the Regional Haze program and its actions in other states, and (3) its determination properly took into account the insignificant visibility gains that would result from installing SCR at Colstrip Units 3 and 4.

PacifiCorp’s *amicus curiae* brief is focused only on EPA’s Reasonable Progress analysis as it applies to Colstrip Units 3 and 4. Specifically, PacifiCorp’s *amicus curiae* brief will assist the Court by explaining that EPA correctly found that the extremely small, modeled visibility results did not justify installing the expensive SCR systems on Colstrip Units 3 and 4.

ARGUMENT

An *amicus* brief is desirable in this case, and the matters asserted in PacifiCorp's brief are relevant to the disposition of this case. This Court should allow PacifiCorp's *amicus* brief because Petitioners have argued that EPA's Final Rule was improper as applied to two units in which PacifiCorp owns an interest, Colstrip Units 3 and 4. The Court's ruling on this issue will affect the application of the same regulations to PacifiCorp's interests in other states. Also, PacifiCorp's *amicus* brief is helpful to the Court because PacifiCorp's experience with regional haze, BART, and the Reasonable Progress analyses issues provides it with a unique and informed perspective on this issue.

1. PacifiCorp has an interest in this appeal because it partially owns two electric generating units that are affected by the Final Rule and addressed in Petitioners' argument.

PacifiCorp's *amicus* brief is appropriate here because it owns an interest in Colstrip Units 3 and 4. Petitioners argue that EPA's Final Rule was arbitrary and capricious because it did not require the owners of Colstrip Units 3 and 4, which include PacifiCorp, to install additional NOx emissions controls. PacifiCorp agrees with EPA and believes that the hundreds of millions of dollars that it would cost to install and operate SCR at Colstrip Units 3 and 4 is not justified by the imperceptible, questionable computer-modeled visibility improvements Petitioners rely upon. As PacifiCorp may be required to invest substantial sums to install and

operate SCR if Petitioners prevail, PacifiCorp has an interest here and should be heard by the Court.

2. PacifiCorp has an interest in this appeal because the correctness of EPA's analysis will affect the application of the same regulations to PacifiCorp's interests in other states.

PacifiCorp is uniquely positioned to be impacted by this appeal because its other coal-fired electrical generating units are directly impacted by the actions that EPA and the other western states have recently made, and will continue to make, in “regional haze” decisions, including Reasonable Progress determinations, which are relevant to this action. This Court’s interpretation of the regional haze statutes, regulations, and guidance could require PacifiCorp to modify or upgrade its coal-fired electric generating units across its system at costs in excess of one billion dollars.

For example, EPA has proposed to partially approve, and partially disapprove, portions of Wyoming’s state implementation plan addressing regional haze, including BART and Reasonable Progress determinations for some of PacifiCorp’s electrical generating units. 77 Fed. Reg. 33,022 (June 4, 2012).³ The Wyoming proposed rulemaking directly affects PacifiCorp’s Wyoming electric

³ Despite “proposing” a final rule in June of 2012 for Wyoming, EPA is currently preparing to “re-propose” the regional haze requirements for PacifiCorp’s and others’ electric generating units in Wyoming. *WildEarth Guardians v. Jackson*, No. 11-cv-00001 (D. Colo. filed Jan. 2, 2011) (Order to Modify Consent Decree).

generating units and involves some of the same issues before this Court in this review, including the amount of visibility improvement that justifies installation of pollution controls to limit NOx emissions under a Reasonable Progress analysis. 77 Fed. Reg. at 33,055.

Additionally, PacifiCorp owns Unit 4 at the Cholla power plant (“Cholla Unit 4”) in Arizona, which is the subject of a Regional Haze Federal Implementation Plan (“RH FIP”). 77 Fed. Reg. 72,512 (Dec. 5, 2012). PacifiCorp has appealed EPA’s BART determination for Cholla Unit 4 to this same Court. *PacifiCorp v. EPA*, No. 13-70425 (9th Cir. filed Feb. 4, 2013). PacifiCorp also owns four units that are subject to BART in Utah. In a December 14, 2012 rulemaking, EPA disapproved portions of Utah’s state implementation plan addressing BART determinations for these units. 77 Fed. Reg. 74,355 (Dec. 15, 2012). PacifiCorp has petitioned for review of this action, which is pending before the Tenth Circuit Court of Appeals. *PacifiCorp v. EPA*, No. 13-9536 (10th Cir. filed Mar. 22, 2013). As this Court’s determination as to the correctness of EPA’s action in the Final Rule here will impact PacifiCorp’s interests in other states as well as the pending review of EPA’s actions in those states, PacifiCorp’s *amicus* brief is appropriate.

3. PacifiCorp is uniquely positioned to provide relevant input for the Court's review of EPA's Final Rule for Montana.

In addition to the fact that this action directly affects PacifiCorp's interests in Montana and will impact its interests elsewhere, PacifiCorp is uniquely positioned to provide relevant input for the Court's review of EPA's Final Rule in Montana as a result of PacifiCorp's extensive background and expertise in the industry and with the regional haze requirements. All of PacifiCorp's twenty-six electric generating units are potentially subject to the Reasonable Progress requirements in the current, or in future, planning periods. PacifiCorp has either petitioned for review or intervened in petitions for review of EPA's regional haze actions in every other state in which it owns an affected interest: Utah, Wyoming, Colorado, and Arizona. PacifiCorp also has worked closely with state regulators in analyzing the applicability of the regional haze program's requirements to its coal-fired electric generating units. As such, PacifiCorp has a unique perspective on EPA's application of the regional haze regulations in Montana.

Specifically, PacifiCorp's *amicus* brief will assist the Court in understanding the congressional intent behind the regional haze regulations, provide perspective on the sources and types of regional haze-related emissions in Montana, and explore the role of imperceptible, computer-modeled visibility impacts in a Reasonable Progress determination analyzing costly and complex pollution control equipment, including the appropriate Reasonable Progress analysis for Colstrip

Units 3 and 4. PacifiCorp's uniquely broad experience on these issues will assist the Court in understanding the fallacies of Petitioners' arguments. As such, PacifiCorp respectfully requests that it be permitted to file an *amicus* brief in support of EPA on these points.

CONCLUSION

PacifiCorp is uniquely positioned to provide relevant input for the Court's review of EPA's Federal Implementation Plan for Montana. Therefore, PacifiCorp respectfully requests this Court grant it leave to file an *amicus curiae* brief to fully address these issues for the Court's consideration.

DATED this 28th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PACIFICORP'S
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT
OF RESPONDENT ENVIRONMENTAL PROTECTION AGENCY**

with the Clerk of the Court for the United States Court of Appeals for the Ninth
Circuit by using the appellate CM/ECF system on this 28th day of May, 2013.

Participants in the case who are registered CM/ECF users will be served by
the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered
CM/ECF users. I have mailed the foregoing document by First-Class Mail,
postage prepaid, to the following non-CM/ECF participant:

Scott C. Fulton, General Counsel
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DATED this 28th day of May, 2013

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions, if any, have been made and, with the execution of those redactions, every document submitted in Digital Form is an exact copy of the written document filed with the Clerk;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection (version 11.0.7000.975), and according to the program are free of viruses.

DATED this 28th day of May, 2013.

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